

Public interest litigation in Europe – The case of climate change

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The annual conference of the European Union Forum of Judges for the Environment in Oxford in October 2017 focused on climate change. In preparation of that annual conference, we have, as usual, submitted a detailed questionnaire to our members¹. Among other things, it aimed to assess the state of case law in this field in European countries. The national reports are available on our website and they give a reliable overview of the situation in 2017, so almost two years after the Paris Agreement, and almost a year after its entry into force².

What is striking is that in several European countries - but certainly not all - and at EU level, climate justice was developing gradually, but that it concerned almost exclusively very specific, often quite technical aspects of the climate legislation, such as the European emissions trading system, support mechanisms for renewable energies, measures to make mobility more sustainable, permits for projects with a significant climate impact or, on the contrary, permits for climate-friendly projects.

Some of these cases enjoyed international renown, e.g. The Vienna airport extension case³. The administrative court is ruling in favor of climate protection - the court ruled that the extension was contrary to Austria's climate goals - had just been declared unconstitutional by the Austrian Constitutional Court. In Norway, an action was brought by Nature & Youth and Greenpeace Nordic against the Norwegian government, because it had just offered 13 companies oil and gas exploration licenses, opening for the first time in 20 years, a new area for the oil and gas industry in the Arctic Barents Sea. This case has recently, on December 22, 2020, been settled by a judgment of the Norwegian Supreme Court, rejecting the request. The Court held that although the Norwegian constitution protects citizens against environmental and climate damage, future emissions from exported oil are too uncertain to prevent the granting of these oil exploration licenses.⁴

A notable exception were the Netherlands. A small environmental association - Urgenda Foundation - had started in 2013, so before the Paris agreement, together with nearly 900 natural persons, a civil procedure against the Dutch State, based on fault based civil liability. The action was based on the thesis according to which the Dutch State had acted wrongly and negligently by not taking sufficient measures to reduce the CO₂ emissions of the Netherlands compared to 1990, thus engaging the tort liability of the State. The claimants demanded to condemn the state to a 25-40% reduction in greenhouse gas emissions by the end of 2020, instead of the 16% EU obligation for the Netherlands.

The judgment of the Hague District Civil Court of June 24, 2015 partially accepted the request. The court ordered the state to reduce the Netherlands' CO₂ emissions by 2020 by 25%. This judgment was because the state had argued in several policy statements that CO₂ emissions in the Netherlands should be reduced by at least 25% by 2020, but failed to implement legislation or other measures to

¹ <https://www.eufje.org/images/docConf/ox2017/oxquestionnaireEN.pdf>

² https://www.eufje.org/index.php?option=com_content&view=article&id=48&Itemid=238&lang=en

³ <http://climatecasechart.com/non-us-case/in-re-vienna-schwachat-airport-expansion/>

⁴ <http://climatecasechart.com/non-us-case/greenpeace-nordic-assn-and-nature-youth-v-norway-ministry-of-petroleum-and-energy/>

ensure this reduction. Given the state's duty of care to protect and improve the living environment, the state needed to do more to avert the looming danger caused by climate change.⁵

Since then, and three and a half years later, climate jurisprudence has really exploded. First, the Dutch state appealed against this decision by the district court in The Hague. Many well informed observers were sure: the Court of Appeal would undoubtedly reform this decision which was considered by many to be incompatible with the separation of powers, because the court, by forcing the state to strengthen climate policy in order to achieve a more ambitious and quantified reduction in greenhouse gases, had taken the place of the executive, and even the legislature. However, the observers were wrong. The Hague Court of Appeal upheld the judgment on October 9, 2018 but, and this is very important, based it on another legal foundation, mainly on the ECHR. The Court of Appeal ruled in fact that based on Article 2 ECHR, the State has a positive obligation to protect the life of citizens under its jurisdiction, while Article 8 ECHR creates the obligation to protect the right to home and to privacy. This obligation applies to all activities, public and non-public, which could endanger the rights thus protected and certainly does apply if industrial activities, which are inherently dangerous, are at stake. When the government knows that there is a real and imminent danger, the state must take preventive measures to avoid as much as possible the damage. On the basis of the reports of the IPCC (Intergovernmental Panel on Climate Change) and the work within the framework of the UN Framework Climate Change Convention and the Paris Agreement, the Court concluded that there is a real threat of dangerous climate change, posing a serious risk that the current generation of residents will face death and/or disruption to private and family life. After weighing all the elements of the state's defense, the Court of Appeal concluded that the state was acting illegally, since it was contrary to the duty of diligence of Articles 2 and 8 ECHR by failing to make further reductions by the end of 2020 and that the state should reduce emissions by at least 25%.⁶

Critics of this jurisprudence remained and focused above all on the separation of powers and the role of judges. It was up to the Dutch Supreme Court (*Hoge Raad*) to say the last word. Based on the very detailed conclusions of two advocates-general (150 pages, almost 600 footnotes)⁷ the Court dismissed the appeal in a judgment of December 20, 2019.⁸ The Supreme Court based its judgment on the United Nations Framework Convention on Climate Change and on the state's legal obligations to protect the life and well-being of civilians in the Netherlands, enshrined in the European Convention for the Protection of Human Rights. According to the Court, there is a broad consensus between science and the international community on the urgent need to reduce greenhouse gas emissions by at least 25% towards the end of 2020 by developed countries. The State has not explained why a smaller reduction can be considered justified and may still ultimately lead to the ultimate goal accepted by the State. The State had defended the thesis that the decision-making on the reduction of greenhouse gases belongs to the policymakers. However, the Court observes that the Constitution obliges the Dutch judge to apply the provisions of the ECHR. This task of the judge to provide legal protection is an essential element of the democratic rule of law. This is what the Court of Appeal did in this case, according to the Supreme Court.

⁵ <http://climatecasechart.com/non-us-case/urgenda-foundation-v-kingdom-of-the-netherlands/>
http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2015/20150624_2015-HAZA-C0900456689_decision-1.pdf

⁶ http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2018/20181009_2015-HAZA-C0900456689_decision-4.pdf

⁷ http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20190913_2015-HAZA-C0900456689_opinion-1.pdf

⁸ http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200113_2015-HAZA-C0900456689_judgment.pdf

Since the first Urgenda judgment, it seems that in various countries in Europe strategic cases on the main orientations of climate policies are based on human rights or fundamental conventional or constitutional rights. This is the case in Germany⁹, Belgium¹⁰, Spain¹¹, France¹² and Ireland.¹³

On September 3, 2020, six young Portuguese filed an application before the European Court of Human Rights (ECtHR).¹⁴ The objective is to recognize the responsibility of 33 European states in the climate crisis. The petitioners complain about the non-compliance by these States with their positive obligations under Articles 2 and 8 of the Convention, read in the light of the commitments made under the Paris Climate Agreement. They have just taken an important step. On November 30, 2020, the Strasbourg Court notified the request to the States concerned, after the president of the section in charge of the case had considered that this request should be examined as a matter of priority. The Court put three questions to the parties. The first is whether the facts denounced are of such a nature as to engage the responsibility of the States concerned "taken individually or collectively because of their national or, as the case may be, European policies and regulations". If so, the question arises as to whether the applicants suffered "directly or indirectly and seriously" from the consequences of insufficient action by States to achieve the 1.5 ° C target of the Paris Agreement. Finally, if the answer is also positive, have the States fulfilled their obligations under the applicable provisions of the European Convention on Human Rights, read in the light of the principles of precaution and intergenerational equity? In the meantime, a similar request was lodged on November 26, 2020, by a group of older Swiss women, after the Swiss Federal Administrative Court rejected their case in 2018, on the grounds that Swiss women over 75 are not the only population affected by the effects of climate change¹⁵. On May 20, 2020, the Swiss Supreme Court dismissed the appeal. The Court concluded that the rights claimed by the plaintiffs had not been affected with sufficient intensity and that the remedy they sought had to be obtained through political rather than legal means.

A similar action, the case of Armando Carvalho and others v European Parliament and Council of the European Union¹⁶ has been brought before the General Court of the European Union, on the one hand seeking the partial annulment of certain EU climate legislation deemed insufficient and on the other hand, seeking redress in the form of an injunction, obliging the co-legislators to adopt measures "imposing by 2030 a reduction in the level of greenhouse gas emissions included, at the very least, between 50% to 60% of their 1990 level". The General Court declared the case inadmissible on May 8, 2019 for lack of standing based on the very strict "Plaumann-test" applied by the EU courts. The appeal to the Court of Justice of the EU is pending.

It seems that in the near future the ECtHR and the CJEU will or will be able to clarify whether the Dutch Supreme Court's approach is indicated or not. In the meantime, the number of climate cases involving major projects that have an impact on the climate or the policies of multinationals in this area is also increasing.

⁹ <http://climatecasechart.com/non-us-case/family-farmers-and-greenpeace-germany-v-german-government/>

¹⁰ <http://climatecasechart.com/non-us-case/vzw-klimaatzaak-v-kingdom-of-belgium-et-al/>

¹¹ <http://climatecasechart.com/non-us-case/greenpeace-v-spain/>

¹² <http://climatecasechart.com/non-us-case/notre-affaire-a-tous-and-others-v-total/>

<http://climatecasechart.com/non-us-case/commune-de-grande-synthe-v-france/>

¹³ <http://climatecasechart.com/non-us-case/friends-of-the-earth-ireland-v-the-government-of-ireland-et-al/>

¹⁴ <http://climatecasechart.com/non-us-case/youth-for-climate-justice-v-austria-et-al/>

¹⁵ <http://climatecasechart.com/non-us-case/union-of-swiss-senior-women-for-climate-protection-v-swiss-federal-parliament/>

¹⁶ <http://climatecasechart.com/non-us-case/armando-ferrao-carvalho-and-others-v-the-european-parliament-and-the-council/>

In this respect one can mention the recent judgments of the French Council of State and the Administrative Court of Paris.

In the *Grande-Synthe* case¹⁷ the *Conseil d'Etat* ruled that the case was admissible and instructed the government to justify, within three months, that it was taking adequate actions towards meeting its own 2030 climate goals. According to the Court, the coastal communities' claims are admissible in part because the city is particularly exposed to the effects of climate change. The Court also accepted interventions by NGOs and other interested cities. The Court then noted that France committed itself to a 40% reduction in GHG emissions by 2030, compared to 1990 levels, and instructed the government to justify its ability to meet this goal without stricter measures. Although the Court signaled the decision would be driven by French and European law and not the Paris Agreement, the Court reasoned that the Paris Agreement must be considered in the interpretation of national law.¹⁸

L'affaire du siècle ("the case of the century") concerns a case brought by a number of NGOs in 2019. The Administrative Court of Paris issued a first judgment on this matter on 3 February 2021. The Court bases its judgment on Article 1246 of the French Civil Code, it concerns a provision inserted in that Code in 2016 regarding civil liability for ecological damage (described in Article 1247 of that Code). Article 1248 of that Code determines who can bring a claim for redress. This includes environmental organizations that meet certain conditions. The four NGOs therefore have an interest in bringing the case. The administrative court of Paris has concluded that there is ecological damage within the meaning of art. 1247 of the Civil Code. Reference is made to the reports of the IPCC. To determine the liability of the French state, reference is made to the UNFCCC, the Paris Agreement, the European climate directives and regulations, the *Charte de l'environnement* (French Environmental Charter with constitutional value) and the Energy Code. The Energy Code sets the 2030 and 2050 climate targets for emission reduction, provides for carbon budgets and the development of a low-carbon national strategy. From this, it is inferred that France recognizes the urgency of the climate crisis, has made international commitments and has committed itself at national level to use its regulatory powers to reduce national emissions. The Court condemns the French State to comply with its own targets (- 40% emission reduction in 2030; carbon neutrality in 2050). The demand to impose targets that are more ambitious is rejected because France already has more ambitious targets than the EU. The court grants the claim for redress in kind and in view of determining the content of the injunction, the debate is reopened for a period of 2 months. Each of the NGOs must be paid a symbolic euro as moral compensation.

I think we can safely say that in the decades to come, national courts and tribunals will inevitably be increasingly confronted with such cases and that they will be able to learn from what their colleagues in other countries and international courts decide.

¹⁷ <http://climatecasechart.com/non-us-case/commune-de-grande-synthe-v-france/>

¹⁸ http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20201119_Not-Yet-Available_decision-2.pdf